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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 87

RICHARD S. SIMPSON,
Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Respondent.

Brief in Opposition to Petition for Certiorari

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SUBJECT INDEX

	Page
Opinions Below	1
Statement of the Case	1
Questions Presented	6
Argument	7
Conclusion	13

INDEX OF AUTHORITIES

TABLE OF CASES

	Page
A. C. Becken Co. v. Gemex Corporation, 272 F.2d 1 (7 Cir.)	10
Alexander v. Texas Company, 165 F.Supp. 53 (W.D. La.)	9
Bare v. Richman & Samuels, Inc., 60 C.A. 2d 413, 140 P.2d 895	6n
Connecticut Importing Co. v. Frankfort Distilleries, 101 F.2d 79 (2 Cir.)	12
Continental Wallpaper Co. v. Louis Voight & Sons Co., 212 U.S. 227	11
Danebo Lumber Co. v. Koutsky-Brennan-Vana Co., 182 F.2d 489 (9 Cir.)	13
Hudson Sales Corporation v. Waldrip, 211 F.2d 268 (5 Cir.), cer. den. 348 U.S. 821	9
Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211	12
Leo J. Meyberg Co. v. Eureka Williams Corp., 215 F.2d 100 (9 Cir.), cer. den. 348 U.S. 875	9
McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332 (4 Cir.)	9
Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5 Cir.)	9
New Home Appliance Center v. Thompson, 250 F.2d 881 (10 Cir.)	6n
Osborn v. Sinclair Refining Co., 207 F.Supp. 856 (D. Md.)	11
Osborn v. Sinclair Refining Co., 286 F.2d 832 (4 Cir.) cer. den. 366 U.S. 963	10
Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir.), cer. den. 355 U.S. 822	9
Paraco, Inc. v. Dept. of Agriculture, 118 C.A. 2d 348, 257 P.2d 981	5n
Pennsylvania Water & P. Co. v. Consolidated G. E. L. & P. Co., 209 F.2d 131 (4 Cir.), cer. den. 347 U.S. 960	12
Philco Corp. v. Radio Corp. of America, 186 F.Supp. 155 (E.D. Pa.)	13

Pages

Ring v. Authors League of America, 186 F.2d 637 (2 Cir.) 10, 12
Ring v. Spina, 148 F.2d 647 (2 Cir.) 10

Schwing Motor Co. v. Hudson Sales Corp., 138 F.Supp. 899, affirmed 239 F.2d 176 (4 Cir.), cer. den. 355 U.S. 823 ..... 8, 9
Shasta Douglas Oil Co. v. Work, 212 A.C.A. 640, 28 Cal. Reptr. 190 6
Simpson v. Union Oil Co., 162 F.Supp. 746 2
Standard Oil Co. v. United States, 337 U.S. 293 ..... 5n

United States v. Standard Oil Company of California, et al., 1958 Trade Cas. Para. 69,212 at p. 74,760 ..... 5n
United States v. Parke Davis & Co., 362 U.S. 29 8

STATUTES AND RULES

California Civil Code:
Section 2026 6
Section 2027 6
Section 3515 12

Restatement of Torts:
Section 892 ..... 10n
Comment a to Section 892 ..... 11n

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 907

RICHARD S. SIMPSON,
Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Respondent.

Brief in Opposition to Petition for Certiorari

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. i-x) is reported 311 F.2d 764. The District Court's opinion is reported only in 1961 Trade Cases § 69,936. An earlier opinion of the District Court denying an interlocutory injunction is reported 162 F.Supp. 746.

STATEMENT OF THE CASE

It is necessary to state the case, for the petition fails to do so accurately or clearly.

Respondent is a producer, refiner and marketer of gasoline and either holds under lease or owns realty on which it has erected service stations. Before 1955 it merchandised gasoline by selling to retailers for resale by them. In 1955 it discontinued this method of merchandising and adopted another, that of selling its gasoline directly to the motoring public through its own service stations by consignee agents to whom it paid a commission with a guaranteed minimum.

As a salaried employee of respondent, petitioner had been one of its dealer representatives and thus knew that it would not sell gasoline to dealers and that it would not lease its service station properties except to consignees. Ceasing to be an employee, desiring to become an operator of one of respondent's service stations, and knowing the terms upon which alone it would deal with him, he asked for and in May 1956 chose to accept a lease for a term of one year (terminable by him but not it any time on 30 days' notice) and to become a consignee under an agreement terminable by either party at the end of any year but in any event on expiration of the lease. In May 1957 respondent gave him a new lease for another year expiring by its terms May 22, 1958.

Being informed in 1958 that respondent would not give him yet another lease, he brought this suit the day before the end of his term to enjoin it from taking possession of its property. June 3, 1958 the District Court denied the requested relief (R. 42), *Simpson v. Union Oil Co.*, 162 F.Supp. 746, on the ground that the lease and consignment agreement had expired and that it could not compel the making of a new lease.

Thereupon respondent sued petitioner in a State court for unlawful detainer of its property and obtained judgment that at all times after May 22, 1958 it was entitled to possession (R. 105, 106). Petitioner then surrendered possession in compliance with that judgment and promptly obtained and began to operate a service station of General Petroleum Co. (Socony-Mobil) where

he and a partner have each averaged more profit than petitioner had done at the respondent's station (R. 86, 320-3).

The present suit thus becoming moot, petitioner amended his complaint to seek damages in lieu of equitable relief (R. 46). On respondent's motion for summary judgment (R. 59) the District Court (by another judge) stated that "plaintiff's case is extremely thin" but denied the motion without prejudice in order to permit petitioner the opportunity to "throw more light upon the alleged claim" by further discovery (R. 87, 88).

Following approved practice,* extensive discovery and pre-trial then ensued, before a third District Judge. To eliminate possible issues of fact respondent stipulated to facts claimed by petitioner. As the court below observed, "to say the least, plaintiff's contentions vacillated" (Pet. App. v, vi), but, nevertheless, in the end petitioner told the District Court that he proffered only two issues as respects liability: (1) Whether the consignment agreement was unlawful on its face, and this he conceded involved no issue of fact, and (2) whether the consignment agreement was "coerced" on unwilling lessees (R. 378). The following colloquy then occurred (R. 379-380):

> "MR. LASKY [Respondent's counsel]: * * * when plaintiff alleges that he was compelled to accept a one-year lease and he was compelled to accept a consignment agreement, does he mean anything more than this: That if he wanted to get a lease on this property and he wanted to handle Union products * * * the only type of contract we would give him by which we would deal with him was a one-year lease and a consignment contract—if that is what he means when he says he was coerced into taking it, because if he didn't take that, we wouldn't deal with him, then I say those are the

*As exemplified in the statement of Chief Judge Murrah in *New Home Appliance Center v. Thompson*, 250 F.2d 881, 883, 884 (10 Cir. 1957), that "issues * * * are to be ascertained and articulated by the free use of controlled pre-trial discovery under the guiding hand of the judge who has the responsibility for the trial of the case".

facts: Either he took our consignment contract and our lease or we wouldn't deal with him.

"THE COURT: That is precisely what you mean by the word 'compel'?

"MR. KEITH [Petitioner's counsel]: *This statement is correct.*

"THE COURT: And to the extent that that may be regarded as coercion, you will stipulate to that, is that right, Mr. Lasky?

"MR. LASKY: Why, yes. I don't stipulate it is coercion, but I say these are the facts.

"THE COURT: If that constitutes coercion—

"MR. LASKY: Then we coerced him."

With this concession by petitioner of what he meant by "coercion" (see also R. 423-425) and this stipulation by respondent of the facts involved in the contention, petitioner conceded that the issue of "coercion" was also a pure issue of law (R. 379-380).

In the end, in response to the court's request to petitioner for a statement whether there were any issues of fact to try, petitioner conceded that there were none except as to the amount of damages if damages were legally recoverable (R. 412-435, particularly 427-428). As summarized by the District Court (R. 347), "Extensive pre-trial proceedings before this court have eliminated all the factual disputes and defendant has stipulated to certain disputed specific allegations of fact to facilitate disposition of this case on reciprocal motions for summary judgment."

The case does not involve conspiracy. Petitioner early conceded (R. 369) "This is not a conspiracy case. This is a case of activities of a single defendant", a concession later repeated (R. 395), "the complaint does not charge a conspiracy". No more did it involve monopolization. Petitioner early conceded that the issue of monopoly "is out of the case" (R. 397). Thereafter, in his "Pre-trial Statement for Pre-trial Ruling" (R. 199), superseding his amended complaint (R. 399-406), there was no mention or charge of mo-

nopoly or monopolization, nor was there at the later pre-trial conference pin-pointing the issues (R. 407-435).*

Cross motions for summary judgment were made and that of respondent was granted. The District Court held that use by the owner of merchandise of a consignee-agent to sell its property at the prices directed by the principal did not violate the Sherman Act. It also held that there were no actionable damages. On appeal the court below did not decide any question of legality under the antitrust laws of respondent's conduct, "because it appears clearly on the record that Simpson suffered no actionable damage" (Pet. App. ii). On that ground it affirmed.

While there are references in the petition to "exclusive dealing", petitioner claimed no damages from any alleged exclusive dealing.† As stated both in the opinion of the court below (Pet. App. v) and in the petition itself (p. 7) he claimed but two types of damage, (a) $150,000 because he was "unable to obtain a lease from the defendant for a reasonable period of time", this latter

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*Petitioner could do no less than drop reference to monopolization. As noted in *United States v. Standard Oil Company of California*, et al, 1958 Trade Cas., para. 69,212 at p. 74,760, there were approximately 36,000 service stations on the West Coast; about 21,000 were either owned by dealers themselves, or leased by them from persons other than any of the seven defendants in that case, of which respondent was but one. Respondent's stations sold only about 11.5% of the total gasoline in California (R. 38). There were at least 246 service stations in Fresno, California (the location of the station leased to petitioner) of which only 26 were selling respondent's gasoline, all in competition with stations selling the products of the various companies named above and numerous other marketers (R. 15-17, 113). Courts judicially know that this competitive situation prevails throughout California and that there is a "rather extensive list of great corporations engaged in the manufacture and sale of petroleum products". *Paraco, Inc. v. Dept. of Agriculture*, 118 C.A. 2d 348, 353, 257 P.2d 981 (1953). This Court has noted that even Standard Oil Company of California does not have a dominant position. *Standard Oil Co. v. United States*, 337 U.S. 293, 302 (1949).

†There was no requirement of exclusive dealing. Petitioner admitted at pre-trial that he would rest the claim on whatever answer he obtained to a certain interrogatory (R. 432, 434) and the answer did not show any such requirement (R. 336, 434).

being variously phrased, and (b) $1,000 for alleged inability to establish his own retail prices from May 1956 to March 1958. He conceded that he did establish his own prices from March to May 22, 1958 (Pet. App. ix).

QUESTIONS PRESENTED

The questions stated in the petition (pp. 2, 3) are not involved in the decision below. The true questions are these:

1. Absent a conspiracy, can a person demand that the owner of real property lease it to him on terms to be fixed by court or jury or pay him damages, on the ground that the only terms on which the owner is willing to lease would be, arguendo, incompatible with the antitrust law.

2. Can one party to an agreement recover from the other party damages said to flow from his own voluntary performance of the agreement on the ground that it violates the antitrust law?

The use of consignee-agents to sell gasoline was in accord with California Civil Code §§ 2026 and 2027* and has been held not to violate California's antitrust law, *Shasta Douglas Oil Co. v. Work*, 212 A.C.A. 640, 28 Cal. Reptr. 190 (Feb. 1963, hearing by Cal. Supreme Court denied, April 3, 1963). But no issue of legality of respondent's conduct is presented by the decision of the court below, for it did not reach any such issue.

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*Cal. Civ. Code § 2026, adopted in 1872, provides that

"A factor is an *agent* who, in the pursuit of an independent calling, is employed by another to sell property *for him*, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser."

Section 2027 provides:

"*A factor must obey the instructions of his principal* to the same extent as any other employee, notwithstanding any advances he may have made to his principal upon the property *consigned* to him * * *."

Included in the "instructions of his principal" that a consignee must obey are those respecting the price at which the owner's goods are to be sold. *Bare v. Richman & Samuels, Inc.*, 60 C.A. 2d 413, 140 P.2d 895 (1943).

ARGUMENT

1. *If in 1956, before petitioner had ever become a lessee or consignee, he had declined to accept a consignment arrangement, certainly he could not have compelled respondent to lease its property to him without a consignment agreement, or pay him damages, on a theory that consignment was illegal.* The fact that he did enter into the consignment agreement for a space of time did not enlarge his rights and entitle him to still further leases on other and different terms. What petitioner seeks is more than a declaration that his consignment contract, dead and past since 1958, was illegal. Divorced from actionable damages that is a question that only the Attorney General could raise.

Stripped of verbiage, petitioner's grievance is that he wanted to do business with respondent but it refused to do business with him on his terms. He wished to occupy its real property and sell its gasoline but on his own terms. Respondent was not selling gasoline to retailers for resale. The only basis on which it cared to merchandise was to sell its gasoline directly to the consumer by the agency of consignees. It so informed him, and he accepted the terms. Thereafter he became dissatisfied with being a consignee. While at liberty to terminate the relationship at will, he chose not to do so. Sometimes he complied with his agreement, sometimes not. When the lease expired in May 1958 respondent declined to give him another. At that moment he not only ceased to be a consignee but ceased to have any legal interest whatever in its property and became a simple stranger to it. The state court judgment in the unlawful detainer action so adjudicated and is conclusive that under California law he had no further right to possession, tenure or estate.

The essence of what petitioner asked the courts to do is quickly evident. He first asked that the expired consignment agreement be held to have been illegal. The court below assumed, but did not decide, that it was. Petitioner next asked the courts to write a

new agreement between him and respondent, (a) whereby he is given a further tenure in respondent's property beginning May 1958 of a duration thought by him or a jury to be "reasonable" (and his claim of $150,000 damages was predicated on the assumption of a 15-year term (R. 313-314)), and (b) whereby respondent is held bound to sell gasoline to him for the same period after the expiration of the old contract, although it had not sold to him before, at a price to be fixed by the court. By the device of charging an antitrust violation, petitioner first sought to have a federal court, by injunction, give him an estate in respondent's California real property to which he had no right under California law. That relief having been denied, he sought damages for breach of a contract which has never existed but which the court was asked to create for him, doing so *sub nom.* a tort recovery.

The essential question is whether, despite admitted absence of any conspiratorial refusal, federal law imposed on respondent a duty to do what state law did not require, viz., to lease its property to petitioner for a further term after May 22, 1958, because the consignment agreement which expired on that day violated the antitrust laws (an assumption made *arguendo*).

There is a large and undeviating body of law that one who is in the business of selling may unilaterally discontinue selling to another for any reason whatever. Even if petitioner had owned his own place of business, had been buying gasoline from respondent, and respondent had then unilaterally refused to sell him further, whatever its reason, that law would deny him recovery of damages. So recently as *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960) this Court reaffirmed that a manufacturer may legally refuse to have business relations with one who fails to resell at prices satisfactory to or suggested by the manufacturer. To the same effect, *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md. 1956), affirmed on the opinion of the

District Court in 239 F.2d 176 (4 Cir. 1956), cer. den. 355 U.S. 823 (1957);* *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957), cer. den. 355 U.S. 822 (1957); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5 Cir. 1952); *Hudson Sales Corporation v. Waldrip*, 211 F.2d 268 (5 Cir. 1954), cer. den. 348 U.S. 821 (1954)†; *Leo J. Meyberg Co. v. Eureka Williams Corp.*, 215 F.2d 100 (9 Cir. 1954), cer. den. 348 U.S. 875 (1954); *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332 (4 Cir. 1959)‡; *Alexander v. Texas Company*, 165 F. Supp. 53 (W.D. La. 1958).

Petitioner's case is far weaker than this. Even were there erosion of the settled body of law that one may unilaterally discontinue selling to another for any reason, petitioner could not recover, for

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*There the District Court said (138 F. Supp. at 903), "Unless his contract so provides, a dealer once appointed has no tenure, no right to renewal of his contract."

†In the *Nelson* and *Waldrip* cases defendant was accused of refusing to deal further with plaintiff because of his refusal to accede to demands not to handle competitive merchandise. In the *Nelson* case the court said (p. 915):

> "There is nothing whatever in the [Clayton] Act to suggest that it covers a situation where the manufacturer refuses to make a sale or enter into a contract, and it has been stated time and again that a manufacturer has the unquestioned right to refuse to deal with anyone for reasons sufficient to himself."

In the *Waldrip* case the court pointed out (p. 274):

> "Plaintiff had no tenure, no right to a renewal of his contract as master dealer. Defendant, on the other hand, had an absolute right either to renew or not to renew it, and the exercise by it of that right did not, it could not form the basis of a suit under Section 15, even if the evidence had shown * * * that the defendant had done so only because plaintiff had refused to give up in the future his other agencies * * *."

‡The court there said (p. 337):

> "Generally speaking, the right of customer selection is sanctioned by both statute and case law. Absent conspiracy or monopolization, a seller engaged in a private business may normally refuse to deal with a buyer for any reason or with no reason whatever. Thus, the courts have until now not held a seller liable in damages for refusing to deal with one who is unwilling to enter into an unlawful vertical price agreement or an exclusive dealing arrangement."

here not only had respondent never sold to petitioner, but the question is whether one can be compelled to lease real property to another.

No case remotely supports petitioner. The numerous citations of cases of conspiracy are irrelevant. There is no conflict among the circuits to resolve. Petitioner incorrectly claims a conflict with *Ring v. Spina*, 148 F.2d 647 (2 Cir. 1945); *A. C. Becken Co. v. Gemex Corporation*, 272 F.2d 1 (7 Cir. 1959); and *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4 Cir. 1960), cer. den. 366 U.S. 963 (1961). There is no conflict, and the final *Ring* decision and the *Osborn* case fully support respondent. The cited opinion in *Ring v. Spina* was on an interlocutory appeal; the opinion on final decision, *Ring v. Authors League of America*, 186 F.2d 637 (2 Cir. 1951, per Learned Hand, J.) denied damages to Ring on the ground that he had no interest in the property he claimed, for the reason that "the contract by which he obtained whatever interest he did obtain, was unlawful because it was part of the unlawful conspiracy" (p. 641):

> "The plaintiff repudiated it for that reason; but he was not free to repudiate it in part, keeping the right to 'produce,' and rejecting the conditions which the authors had imposed upon their promises, * * *. It follows that the judgment was right in holding that the plaintiff had no interest in the play, if we assume that the 'Agreement' was part of an illegal combination or conspiracy * * *." (p. 642)

So here: Petitioner's postulate is that the lease and consignment were illegal. But, if so, he had no right to some other interest in respondent's property. The rationale of the *Ring* decision is precisely that of the court below: one may not voluntarily put himself into a position or a relation, then claim it to be illegal and insist on acquiring rights from it.*

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*The opinion below (Pet. App. viii) quoted Restatement on Torts, Sec. 892 thus:

> "A person of full capacity who freely and without fraud or mistake manifests to another assent to the conduct of the other is not

In the *Osborn* case plaintiff had been a dealer-lessee of defendant and sought damages for cancellation of the lease on the ground that defendant engaged in an illegal tying arrangement. The District Court first held there was no tying agreement. Holding that there was, the Court of Appeals reversed (p. 835) and remanded but expressly refrained from holding that plaintiff could recover damages, noting (p. 840) that since defendant "had the right to cancel the lease at its yearly termination date, the problem arises whether the damages flowing from the cancellation are recoverable". On remand the District Court held that they were not. *Osborn v. Sinclair Refining Co.*, 207 F. Supp. 856 (D. Md. 1962).

2. Petitioner's second claim for damages—$1,000 for alleged inability to sell at prices as high as he wished during part of his two terms—was a palpable makeweight and afterthought. It was not advanced in the original complaint (R. 3-13). The original complaint was that respondent told him to charge more than he wished. When petitioner amended to claim damages, he about-faced to rest the claim for $1,000 on the contention that respondent had him keep his prices down (R. 465; R. 319-320, 324-329).

Assuming the consignment agreement to have been unlawful, petitioner could have simply refused to be bound by it, *Continental Wallpaper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909), and petitioner had the power to resell the gasoline at whatever price he chose.* If, in truth, he charged less or more for gasoline than he preferred to do, his conduct was his own and any damages flowing therefrom flowed from his voluntary act.

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entitled to maintain an action of tort for harm resulting from such conduct."

Comment a to Sec. 892 adds:

"This is true although it is illegal for assent to be given and although either or both of the parties are liable criminally or liable to third persons because of the conduct consented to."

*Ignoring fair trading, an issue not decided below.

As the court below noted (Pet. App. ix), "The undisputed facts show he did in fact exercise the power or privilege of fixing the prices of gasoline from March 1958 to May 22, 1958", which "demonstrates he was not 'unable' to fix prices on gasoline"; consequently, "when his claim is based on an alleged *inability* to change the situation and his own actions show this ability we think his claim fails." (Italics in original.)

What petitioner's legal assertion amounts to is this: Where A agrees with B to perform a certain line of conduct and from time to time does so, he can then recover treble damages from B on the theory that B could not have compelled him to perform the contract for illegality under the Sherman Act. No case has ever so held, and the contention is contrary to common sense. A party should decline to enter into an illegal contract, or, having entered it, may ignore it. He cannot, however, observe the contract and then recover damages for having done so. *Ring v. Authors League of America*, 186 F.2d 637 (2 Cir. 1951). *Volenti non fit injuria* is an elementary doctrine expressed in California Civil Code § 3515 thus: "He who consents to an act is not wronged by it." Here the principle is stronger: He who does the act is not wronged by it.

The cases cited by petitioner are not in point. A plaintiff will not be denied recovery because of the unclean hands of having been or being engaged *in some other or collateral* illegal conduct, e.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951), or, after one withdraws from a conspiracy, he will not be barred from recovering treble damages *thereafter* inflicted on him by the other conspirators by the continuance of the conspiracy; e.g., *Connecticut Importing Co. v. Frankfort Distilleries*, 101 F.2d 79, 81 (2 Cir. 1939). But what he himself does pursuant to the agreement said to be illegal, he cannot charge to the other. *Pennsylvania Water & P. Co. v. Consolidated G.E.L. & P. Co.*, 209 F.2d 131 (4 Cir. 1953), cer. den. 347 U.S. 960 (1954).

Petitioner exercised his volition to charge the prices he did charge. If he elected to adhere to the consigned prices, he did so for what he thought was a greater advantage to himself, and the act was still his free act. *Philco Corp. v. Radio Corp. of America*, 186 F.Supp. 155, 162 (E.D. Pa. 1960); *Danebo Lumber Co. v. Koutsky-Brennan-Vana Co.*, 182 F.2d 489, 493 (9 Cir. 1950). And during the last several months of his tenancy he determined that the advantage was the other way and proceeded to charge whatever he wished to charge, thus demonstrating his ability to do so.

CONCLUSION

The decision of the court below which petitioner asks this Court to review passed on no questions of legality under the antitrust laws. This is a case of a plaintiff's voluntary conduct and no damage. It is respectfully submitted that the petition should be denied.

Dated: San Francisco, California, April 6, 1963.

MOSES LASKY

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